IN THE

Supreme Court of the United States

October Term, 1952

No. 527

UNITED STATES OF AMERICA,

Petitioner,

—v.—

STANLEY KLINGER, WILLIAM CANTOR, and MORRIS SANDLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinion Below

The opinion of the Court of Appeals (R. 16-31) is reported at 199 F. 2d 645.

Jurisdiction

The judgment of the Court of Appeals was entered on November 3 1952 (R. 21). On November 28, 1952, by order of Mr. Justice Jackson, the time within which to file the petition for a writ of certiorari was extended to and including January 2, 1953. The petition was filed on December 31, 1952, and was granted on April 6, 1953 (R. 25).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

Questions Presented

1. Whether, under the War Time Suspension of Limitations Act of 1942, as amended in 1944, the three year period of limitations, applicable to this crime, began to run on January 1, 1947 after the official termination of hostilities (December 31, 1946) or on January 1, 1950, three years thereafter.

2. Whether the War Time Suspension of Limitations Act is only applicable to a "defrauding" of the United States in the usual and primary sense of the word "defrauding," namely "cheating the Government out of property or money."

3. Whether the War Time Suspension of Limitations Act of 1942, as amended in 1944, repealed in 1948, was preserved by the savings clause, Sec. 21 of the Act of June 25, 1948, c. 645, 62 Stat. 802, or the general savings clause, Sec. 109, Title 1 U. S. C. (formerly R. S. Section 13), so as to apply to the indictment in this case.

Statute Involved

Section 1 of the Suspension Act of August 24, 1942, as amended by Section 28 of the Surplus Property Act of October 3, 1944 (c. 479, 58 Stat. 765, 781; 18 U. S. C. (1946 ed.) 590a), provided:

> "The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) com-

mitted in connection with the negotiation, procurement, aware, performance, payment for, interim financing, cancellation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of World War II, or with any disposition or termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under sections 1611-1614, 1615-1646 of Appendix to Title 50, shall be suspended until three years after the termination of hostilities in World War II as proclaimed by the President or by a concurrent resolution of the Two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses or transactions which are already barred by provisions of existing law."

Statement

The respondents were indicted on March 31, 1950 under a single count of conspiracy beginning on or about January 1, 1946 and continuing thereafter up to and including the date of the filing of the indictment, as aforesaid, to defraud the United States in the exercise of its sugar rationing program, free from dishonesty, fraud and corruption of its administering officers (R. 2-8).*

The indictment further alleged that respondents Klinger and Cantor were investigators in the Food Section of the Enforcement Division of the Office of Price Administration, and that at the direction of the respondents, named

* References to "R." indicate record printed by petitioner. References to "C. A. R." indicate Court of Appeals Record on file in this Court.

co-conspirator grocers were to set up sugar ration accounts, overdraw their allotment, and sell the sugar thus obtained on the black market at prices in excess of the maximum selling price. In pursuance of this conspiracy, the indictment went on, the respondents Klinger and Cantor, who were employees of the Office of Price Administration, would merely recommend suspension of the co-conspirators from further dealings in sugar and would not refer their cases for criminal prosecution. The indictment, except for naming the respondent Sandler as a defendant, is silent as to the part he played. He is mentioned in three overt acts, in two of which he received checks from a co-conspirator, and in the third $1,000.00 in currency. The respondent Morris Sandler operated, together with a partner, the Quaker Sugar Company. He was not an O. P. A. agent as recited in the Government's brief (p. 2). There was no evidence that he knew or ever met any of the other defendant O. P. A. agents. Respondent Sandler merely sold sugar to the co-conspirator grocers, gave correct invoices with the correct names of the purchasers on them, and received in return ration currency for the sugar sold (C. A. R. 1126, 1182-1184). The co-conspirators destroyed their records concerning these transactions, but respondent Sandler retained all his invoices and cancelled checks which were voluntarily turned over to the Department of Justice in December, 1946 or April, 1947, during the investigation then being conducted by the Department of Justice (C. A. R. 471, 2035). From 1947 on, when the Office of Price Administration case records were being destroyed by the Bureau of National Archives, the Department of Justice preserved only those portions of the case records of the respondents Klinger and Cantor pertaining to the co-conspirator grocers who testified for the Government, which it felt necessary for its prosecution of the instant case, but failed to

preserve all of the records material to the issues in this case (C. A. R. 1603-1604, 2017). Such records which may have been exculpatory, explanatory or contradictory of the Government's case were destroyed and not available to respondents Klinger and Cantor (C. A. R. 1604, 2013).

Summary of Argument

A. The charge of conspiracy to defraud under Section 37 of the Criminal Code was complete in December, 1946, prior to the official termination of hostilities, December 31, 1946. Assuming that the Suspension Act of 1942 as amended in 1944 (18 U. S. C., 1946 Ed., 590a) applied to this offense, the indictment was barred since the Suspension Act suspended the "bar" of the three year statute of limitations until December 31, 1949, or three years after the termination of hostilities. This construction of the Suspension Act by the Second Circuit below preserved the original purpose of the 1942 Suspension Act to extend existing limitations periods only by the time elapsing before the termination of hostilities. Further, the construction advanced by the Government would, as to frauds committed prior to the termination of hostilities, enlarge the period of prosecution beyond the limit which Congress would have conceivably tolerated. This interpretation of the Suspension Act is in accord with the opinion of this Court in *U. S.* v. *Smith*, 342 U. S. 225, wherein it was stated that no reasons of policy are suggested for straining the language of the Suspension Act beyond the emergency which made the suspension seem advisable. To hold otherwise would place Congress in the absurd position of providing in the Suspension Act that the three year statute of limitations begins to run on January 1, 1947 for crimes committed after hostilities, and for crimes committed between August, 1942 and December 31, 1946, the

Government shall have all that time plus double the normal three year period. Such an incongruous result should not be attributed to a Congressional enactment, particularly where it was not intended. Moreover, Congress could not have intended to suspend the limitations period for six years after hostilities when in the same Acts, amending the 1942 Act, *viz.* Contract Settlement Act of 1944 and Surplus Property Act of 1944, it only required records of war contractors to be kept for five years. The five year period of limitation for civil suits by the Government under these Acts coincided with the period of keeping of records. Congress would have provided a like period for the keeping of records if it had intended to provide the Government with six years after cessation of hostilities to prosecute.

The contention of the Government is contrary to well established rulings of this Court that statutes of limitation are statutes of "repose" and are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the Government to explode after witnesses and proofs necessary for the protection of the accused have passed beyond availability. The facts in this case well illustrate the soundness of these principles where essential records of the respondents Klinger and Cantor were destroyed by the Bureau of National Archives after the Office of Price Administration ceased its existence. Records which may very well have been exculpatory and probative of innocence were unavailable to them.

The reasoning of the Court below affords the Government ample leeway in the investigation and prosecution of war frauds, balanced by a judicious regard for the interests of persons accused of crime. Its decision was followed in *U. S.* v. *Witherspoon,* 110, F. S. 364, U. S. D. C., E. D. Tenn., February 2, 1953; *U. S.* v. *Clavere et al.* (2

cases), U. S. D. C., N. D. Calif., opinion not officially reported, cert. granted by this Court and case now pending on the docket, Nos. 635, 636; cf. *U. S.* v. *Beacon Brass Co.*, 344 U. S. 43.

B. Under an interpretation of the 1921 Act, concededly the model for the Suspension Acts, this Court twice rejected the Government's contention that a "defrauding," in the secondary sense, that is, of obstructing the lawful operations of the Government by dishonest means constituted a "defrauding" within the meaning of that Act. *U. S.* v. *McElvain*, 272 U. S. 633; *U. S.* v. *Scharton*, 285 U. S. 518.

The *McElvain* case flatly held that the 1921 Act only applied to a special class of cases, to wit, substantive crimes involving fraud as an element of the crime, or conspiracy to commit them. The Congressional history of the 1921 Act and the Suspension Acts clearly reveals that Congress was primarily interested in reaching out of pocket war frauds. In this respect, Congress used the word "defrauding" in its primary sense of cheating the Government out of property or money. *U. S.* v. *Cohen*, 270 U. S. 339. Thus, in *Marzani* v. *U. S.*, 168 F. 2 133, U. S. App. D. C. affirmed by a divided court in 335 U. S. 895, it was expressly held that the Suspension Act only applied to crimes where pecuniary fraud was an essential ingredient of the crime under the statute creating the offense. A conspiracy to defraud, as charged here, will lie under Section 37 without any proof of pecuniary or property fraud. *U. S.* v. *Gilliland*, 312 U. S. 86; *Hammerschmidt* v. *U. S.*, 265 U. S. 182. Pecuniary fraud is thus, not an essential ingredient of a conspiracy to defraud under Section 37. Consequently the Suspension Act is inapplicable to the indictment in this case to prevent the bar of the statute of limitations.

C. The Suspension Act of 1942, as amended in 1944, was repealed by the Act of June 25, 1948, which revised the Criminal Code. It was reenacted as Section 3287, Title 18 U. S. C. in permanent form to be applied "whenever the U. S. is at war." The Reviser's note following §3287, Title 18, U. S. C., indicates quite clearly that the new section applied to future wars, and not World War II. Consequently, repeal of the Suspension Act without an effective savings provision constituted a legislative pardon or amnesty. *United States* v. *Chambers*, 291 U. S. 217, 223.

Neither Section 21 of the Act of June 25, 1948 which preserved "any rights or liabilities" under the repealed statutes, nor the General Savings clause, Section 109 Title 1, U. S. C., succeeded in saving the repealed Suspension Act so as to apply to the indictment in this case. *U. S.* v. *Obermeier*, 186 F. 2 243 (2 C.) cert den. 340 U. S. 951. In an able and exhaustive analysis of the legislative history and prior adjudications of this Court, the Second Circuit Court in the *Obermeier* case (*supra*), concluded that Section 21 of the 1948 Act and Section 109 of Title 1, U. S. C. save merely substantive "rights" and "liabilities' but do not save limitation statutes. Consequently, the Suspension Act is inapplicable to prevent the bar of the statute of limitations from applying. For these reasons, the judgment below should be affirmed.

ARGUMENT

I

The crime charged in the indictment is barred by the Statute of Limitations.

The indictment charged a conspiracy from about January 1, 1946 to the time it was filed on March 31, 1950. Neither the overt acts charged, however, extended beyond December, 1946 (Government's brief p. 3), nor was there proof of any other overt act beyond December 27, 1946 (C. A. R. 1047). As the Court below stated (R. 16):

> "* * * the prosecution did not prove that the conspiracy lasted beyond December 31, 1946; * * *"

The three year Statute of Limitations applicable to this crime (Section 3282, Title 18) normally began to run from the date of the last overt act, presumably December 27, 1946. *Fiswick* v. *U. S.*, 329 U. S. 211. Since more than three years elapsed between the last overt act and the filing of the indictment, the crime was barred unless, as maintained by the Government, the three year Statute of Limitations was extended by the War Time Suspension of Limitations Statute.

The Court below assumed, as did the Government then, and now, that the crime charged was of a type included under the War Time Suspension of Limitations Act, and that the applicable Suspension Act was the Act of August 24, 1942, as amended by the Surplus Property Act of 1944, 58 Stat. 765, 781, 18 U. S. C. (1946 Ed.), Section 590a, now in permanent form in 18 U. S. C., Section 3287.

Based upon its finding of what the legislature intended in enacting the Statute and the opinion of this Court in

U. S. v. *Smith*, 342 U. S. 225, the Court below held, that the three year Statute of Limitations applicable to this crime began to run the day after the termination of hostilities, to wit, December 31, 1946; so that, the indictment was barred since more than three years had elapsed between that date and the filing of the indictment.

It is respectfully submitted that the judgment of the Court below is correct and should be affirmed on the following grounds:

(a) Its interpretation of the Suspension Act is in full accord with the purposes of the Act and the circumstances under which the challenged words were employed;

(b) The Suspension Act is not applicable to the offense charged in this indictment; and

(c) The Suspension Act was expressly repealed by the Act of June 25, 1948 and was not preserved by either the savings clause contained in Section 21 of that Act or the general savings clause, Section 109, Title 1, U. S. C., so as to apply to the indictment in this case.

A. *Under the Suspension Act the three year period of limitations began the day after the termination of hostilities on December 31, 1946.*

The Suspension Act was first enacted on August 24, 1942, c. 555 Section 1, 56 Stat. 747. It is derived from the Act of November 17, 1921, c. 124, 42 Stat. 220, which enlarged the Statute of Limitations to a period of six years in respect to offenses involving frauds against the Government (H. R. 2051, 77th Congress, 2d Sess.; S. R. 1544, 77th Congress, 2d Sess.; Statement of Alexander Holtzoff,

Special Assistant to the Attorney General, in hearings before the Subcommittee of the Committee on the Judiciary of the House of Representatives, 77th Congress, 1st Sess., p. 6 thereof on H. R. 4916; Letter from Attorney General Francis Biddle to Congressman Sumners, Chairman of the Committee on the Judiciary, dated November 29, 1941 appended to the transcript of the aforesaid hearings at page 8 thereof).

It would seem clear from these reports and from the Congressional debates (88th Cong. Rec. 4759) that Congress intended to suspend the normal three year Statute of Limitations during actual hostilities so that, " • • • offenses occurring prior to the termination of hostilities shall not be allowed legally to be forgotten in the rush of the war activities. That is the gist of the Reports." *U. S.* v. *Smith,* 342 U. S. 225, 261.

If actual hostilities had terminated prior to June 30, 1945, the suspension of the Statute of Limitations would have been lifted to coincide with the termination date. That would seem evident from the proviso in the 1942 Act, " • • • shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate."

It would likewise seem to follow from what was said in a letter from Secretary of War Stimson, Acting Secretary of Navy Forrestal, and Acting Attorney General Charles Fahey, to the Chairman of the Senate Judiciary Committee (appended to S. R. 1592, 77th Congress, 2d Sess.) which contemplated the enactment of the Suspension Statute to antitrust offenses (latter passed October 10, 1942, 56 Stat. 781):

> "In instances where anti-trust investigations, prosecutions or suits are postponed, as contemplated by the above mentioned letter, it is advisable and in some in-

stances essential, that the running of the Statute of Limitations be suspended during the periods of postponement (of investigations interfering with the production of war material). Such postponement will be during periods expiring not later than the end of the present war. The proposed bill will accomplish the suspension of the running of the Statute of Limitations applicable to anti-trust cases until June 30, 1945 or the earlier date specified therein." (Parenthesis supplied.)

The Suspension Act referred to was identical to the Suspension Act in the instant case.

Approximately two years later Congress amended the 1942 Suspension Act in the Contract Settlement Act of 1944 and again in the Surplus Property Act of 1944, by providing that the normal three year Statute of Limitations shall be suspended, " • • • until three years after the termination of hostilities as proclaimed by the President or by the concurrent resolution of Congress":, and further, adding two additional clauses of types of offenses pertaining to disposal of surplus property and contract termination. .

It is this amendment upon which the Government relies for its position that the present indictment is not barred. The Government contends here, as it did below (Govt's. brief in the Court of Appeals, p. 10), that:

"Thus, until December 31, 1949, there was no Statute of Limitations for the applicable crimes, but on January 1, 1950, all limitations periods began to run their normal course." (Govt's. brief, p. 9);

or as it otherwise stated (*ibid*):

"The beginning of the period of suspension is August 24, 1942, when the Act was originally passed, and the

terminal date is 'three years after the termination of hostilities in the present war,' i.e., December 31, 1949."

The Government would thus have the Suspension Act interpreted in such a way as to impute to Congress an intent to give it from August 24, 1942 to December 31, 1949, or a period of seven and one-half years when the Statute of Limitations was to be inoperative, and an additional three years from December 31, 1949, *i.e.*, until December 31, 1952, at which time the crime would be barred. This interpretation would afford the Government ten and one-half years before the bar of the Statute would apply. It would also extend the bar of the Statute six years after the termination of hostilities and some seven and one-quarter years after V-J day on September 2, 1945. Significant in this regard is that the Government's claim imputes to Congress an intention to give it four and one-half years more than the six years provided in the 1921 Act, which, concededly, was the model for the 1942 Act.

Whether Congress ever intended to extend the bar of the Statute as the Government claims is the question. If it did so intend, obviously it was doing what it never did or intended in its enactment of the 1942 Act and the October, 1942 Act as to anti-trust suits.

The Circuit Court below could not find any such Congressional intention in the legislative history of the 1944 Acts to support the Government's position (R. 20). There is nothing to that effect in the official report of the Statement of the House Managers (H. R. 1708, 78th Congress, 2d Sess.), and as the Court below indicated:

"However, if Congress had so changed its mind, the Senate report which appended the bill gave no such indication, * * *" (S. R. 1057, 78th Congress, 2d Sess.)

If Congress had intended to extend the bar of this Statute six more years from the termination of hostilities, it would have been a simple matter to do so. Nowhere in the official reports of the House and Senate Committee does it appear that Congress in passing the 1944 Acts intended to do more than suspend the three years Statute of Limitations during the period of hostilities as it had done in the 1942 Act.

The claim that the two later amendments to the Suspension Act were passed during the latter part of the war when Congress was looking toward post-hostilities problems and re-conversion (Government's pet. for cert. p. 10) is not a basis for imputing to Congress an intention to extend the Suspension Act as the Government asserts.

The termination of hostilities occurred more than sixteen months after the shooting war stopped. In addition, as stated by Mr. Justice Clark in his concurring opinion in *U. S.* v. *Smith*, 342 U. S. 225, 230:

> "Immediately after V-J Day all war procurement stopped, contracts were canceled, and renegotiation was speeded up. The President did not proclaim the cessation of hostilities until December 31, 1946, sixteen months after the fighting ceased. *During this period, the pressing problems of demobilization and reconversion—problems likely to cause the continued perpetration of frauds on the Government—were for the most part brought to an end.*" (Emphasis supplied.)

Authority for such a statement can be seen from the fact that Mr. Justice Clark was Attorney General of the United States at that time and in the best position to know. Moreover, the Contract Settlement Act of 1944 and the Surplus Property Act of 1944 were introduced and enacted because Congress was convinced that preparation for the transition

from war to peace should be undertaken well in advance of the end of hostilities. (Statement of Sen. Mahoney, Committee on Military Affairs. S. R. 321, 79th Congress, 1st Sess., May 31, 1945.) In that report, "Investigating Disposal of Surplus Government Property and Related Problems," Senator Mahoney, at page 2 thereof, indicates that as of March 31, 1945, the Government had terminated 27½ billion dollars' worth of contracts and settled, already by that date, 18 billion of that amount.

The Government, incidentally, made the same argument in *U. S.* v. *Smith*, 342 U. S. 225, which was rejected by this Court, at pages 227-228.

A further indication that Congress did not intend to extend the Suspension Act six years from the termination of hostilities is Section 19(a) of the Contract Settlement Act of 1944 which made it a crime to secrete or destroy records relating to the identical subject matters contained in the second and third clauses of the Suspension Act, "* * * until * * * (3) five years after the termination of hostilities in the present war."

To arm the Department of Justice with a power to indict at any time within six years after the termination of hostilities, as is contended by the Government here, Congress would certainly have required those who dealt with the Government, and against whom it was its purpose in suspending the Limitations Statute, to keep its records for an equal length of time. Any other conclusion would lead to an absurd result since any prosecutor knows that the right to examine and obtain such records is essential to any possible prosecution. That is exactly what happened in the instant case when the Government obtained the respondent Sandler's records (C. A. R. 471, 2035). Congress, in the same Act, would not have provided a six year

limitation after hostilities to prosecute for war crimes and only a five year requirement after hostilities for war contractors to preserve their records. (This provision was repealed by the Act of June 25, 1948 and reenacted as Section 443, Title 18 U. S. C., except that the word "until" was deleted and the words "before lapse of" substituted [Reviser's Note to Section 443, Title 18 U. S. C.].)

This contention finds ample support in the fact that the five year provision for the keeping of records (19(a) *supra*) coincided with the five year provision of limitations for the bringing by the United States of any action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, provided for both in the Contract Settlement Act of 1944 (§19c, §119, Title 41 U. S. C.) and the Surplus Property Act of 1944 (repealed June 30, 1949, 63 Stat. 399, reenacted Section 489, Title 40 U. S. C., eff. July 1, 1949).

Indeed, if the limitation period for civil suits under the Contract Settlement Act of 1944 and the Surplus Property Act of 1944, which, incidentally, are predicated upon actions of "fraud" and "defrauding," are within the scope of the Suspension Act, so held in *U. S.* v. *Witherspoon*, 110 F. S. 364, D. C. E. D. Tenn. 1953, the Government, as it contends, would have eleven years from the termination of hostilities to bring such a suit, or fifteen and one-half years from August, 1942, an incredible length of time in view of the absence of any expressed intention by the Congress to accomplish such a result.

A further illustration of the weakness of the Government's position as to the need for greater time can be found in the history of the instant case. The conspiracy was apparently hatched in February, 1946, some six months after V-J day. Before it was even completed, in November of 1946 the Department of Justice was already investigat-

ing it (C. A. R. 1005). The statements of its co-conspirator witnesses who testified at the trial were obtained in December, 1946 (C. A. R. 798). The records of the respondent Sandler, essential to the prosecution, were voluntarily turned over to the Department of Justice in December, 1946, or April, 1947 (C. A. R. 471, 2035). The respondents were arrested April 30, 1947. Certainly, the failure to indict until March 31, 1950, was not due to its inability to proceed as a result of the pressing problems of the war. The Government delayed this case for reasons best known to it, but apparently quite apart from the reasons it urges as a basis for its construction of the Suspension Act.

But in delaying the prosecution in the instant case, the Department of Justice points up the grave injustices that result from a liberal extension of the Suspension Act. I mention this because in determining the legislative intention of that Statute, this Court should not overlook its effect on the case at hand.

An essential part of the Government's case below dealt with the scheme whereby respondents Klinger and Cantor would advise co-conspirators Morgenbesser, Allan Shapiro and Isidore Shapiro to apply for sugar allotments, would then cover up their violations, and thereafter suspend them rather than recommend criminal prosecution (R. 2-8).

From time to time during the trial, counsel for the respondents requested the Government to produce the actual O. P. A. files of these co-conspirators, not only to test the accuracy of their testimony (as for example C. A. R. 100), but more importantly because the respondents regarded such documents contained in those files essential to their defense and to their innocence.

The Trial Court below took the position that these respondents were entitled to this material (C. A. R. 1068,

1069). The Trial Court took the further position that respondents Klinger and Cantor were entitled to records *in other cases* which might indicate that they had properly fulfilled their duties in all respects (C. A. R. 1682). Respondents had demanded such records (C. A. R. 1679-1688). Counsel for the Government below admitted he did not have any such records which pertained to these cases except for such Government exhibits which he offered in evidence. As to the records demanded by respondents Klinger and Cantor which had to do with cases other than the one at trial, counsel for the Government claimed they were immaterial (C. A. R. 1682).

In a colloquy between Court and counsel (C. A. R. 1601-1605), it appeared that unless the Department of Justice had subpoenaed the ration files of all these grocers (co-conspirators) or others with whom the respondents Klinger and Cantor had anything to do, the probability is that they were destroyed pursuant to an Act of Congress. In this colloquy, counsel for the Government below admitted that he had never subpoenaed the entire ration files of these co-conspirators who testified and that as far as he knew, no investigative agency that had anything to do with this case was asked to preserve any O. P. A. records other than the ones he offered in evidence (C. A. R. 1603-1604). Counsel for the Government stated further that he didn't believe that the Alcohol Tax Unit, the agency which took over the O. P. A. records for this prosecution, had any of the records or documents sought by the respondents Klinger and Cantor (C. A. R. 1069). The Court below indicated that the evidence is that such records sought by respondents Klinger and Cantor have been destroyed (C. A. R. 1604).

Upon the failure of the Government to produce the pertinent records sought by respondents Klinger and Can-

tor, a subpoena was served upon Wayne C. Grover, Head of the National Archives, Industrial Records Branch of the United States Government, seeking the production of any and all of such records which pertained to the ration files of the co-conspirators in this case, including inves .- gative reports in that connection, as well as other cases, of the respondents Klinger and Cantor (Exhibit Greif LL). A representative of that Agency, Victor Gondos, appeared and testified for the defense (C. A. R. 1991, etc.). Dr. Gondos testified that pursuant to an Act of Congress, O. P. A. records were destroyed except for those records which the Government or any of its agencies wanted to preserve (C. A. R. 1999). Dr. Gondos testified that there is nothing in the files of the National Archives that was contained in the subpoena (C. A. R. 2002). The Court below picked at random certain of the requests in the aforesaid subpoena and asked Dr. Gondos whether or not he specifically looked for such documents and what his answer was (C. A. R. 2005-2006). Upon the constant objection of counsel for the Government below as to whether or not Dr. Gondos could testify that these records sought for in the subpoena ever existed, including the daily activity reports of respondents Klinger and Cantor, Dr. Gondos was asked the following question (C. A. R. 2013):

> "Q. Do you know whether any of these things were ever in being? A. I have reason to believe they were in being at one time."

The questions and answers continue in the record, pages 2014, etc.

During the investigation which apparently began in December of 1946 and continued on in 1947 and probably later, the Government had the opportunity to preserve all of these records which were not only material to the prose-

cution of this action, but also which would be admissible as either exculpatory, or explanatory, or contradictory of the prosecution's case, or at least relevant to the issues of the instant case. This the Government admits it failed to do.

Fundamentally, Statutes of Limitation have been liberally interpreted in favor of repose. As this Court has previously stated in *U. S.* v. *Scharton*, 285 U. S. 518, 522, apropos the six year Statute of Limitations provided in the 1921 Act:

> "And as the section has to do with statutory crimes, it is to be liberally interpreted in favor of repose and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses. (Cases cited.)"

Basically this is so because, as stated by the Court in *U. S.* v. *Eliopoulos*, 45 F. S. 777, 781, D. C. N. J., 1942:

> "Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability."

Thus the undue extension of the limitations period can have particularly harsh effects upon the rights of persons accused of crime. The destruction of the records in this case is merely an illustration of what may have occurred to the multitude of records of other extinct government agencies. It is an added, but significant, objection to more than doubling the statute of limitations after hostilities ended.

The Government seeks to justify its position mainly in reliance upon a literal interpretation of the words used in the Suspension Statute. To support its interpretation of what Congress meant in enacting the Suspension Act, it cites a series of civil war cases to prove that the words "the running of the suspension of limitations" means literally, "* * * counting out or tolling from the period of limitations the period of suspension" (Govt.'s brief, pp. 10-11). However, these decisions do not involve the construction of the terms of a statute of limitation, but rather, as pointed out by this Court in *Bauserman* v. *Blunt*, 147 U. S. 647, 654, as implying an exception by reason of the effect of a state of war based upon public and international law. Our concern here is with the legislative intent to be derived from the express terms of a statute. Cf. *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, 253; *Vermilya-Brown* v. *Connell*, 335 U. S. 377, 386-387.

Whether the word "running" means literally what the Government claims or whether it is interpreted as meaning "having run" is immaterial, in the abstract, unless such definition accords with the legislative intention; for, it has been held on many occasions by this Court that the meaning intended by the legislature should prevail even though it might be contrary to common usage or to technical construction. (See, *e.g.*, *U. S.* v. *Bryan*, 339 U. S. 323, 335, where the Court states:

> "Admittedly her testimony relative to production of the books comes within the literal language of the statute; but the trial court thought that to apply the statute to respondent's testimony would subvert the Congressional purpose in its passage. We agree.";

and as Mr. Justice Reed said for this Court in *U. S.* v. *C. I. O.*, 335 U. S. 106, 112:

> "Expenditure as here used is not a word of art. It has no definitely defined meaning and the applicability of the word must be determined from the circumstances surrounding its employment."

Thus, as this Court has indicated, words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the Congress, and that their meaning in particular instances are to be arrived at not only by a construction of the words themselves, but by considering as well the context and purposes of the law and the circumstances under which the words were employed. *Vermilya-Brown* v. *Connell*, 335 U. S. 377, 386.

The Court below held that the Suspension Act operated to suspend "the bar" of the limitations statute, not its "running" in a literal sense. This conclusion, Judge Learned Hand observed, preserved the original purpose of the 1942 Act to extend existing limitation periods only by the time elapsing before the termination of hostilities and upon the further ground that the interpretation urged by the Government would, as to frauds committed prior to the termination of hostilities, enlarge the period to prosecute beyond the limit which Congress would have conceivably tolerated.

It was exactly what was said by Mr. Justice Douglas in *U. S.* v. *Smith*, 342 U. S. 225:

> "No reasons of policy are suggested for straining the language of the Act to suspend the running of the statute beyond the emergency which made the suspension seem advisable."

Thus, as interpreted by this Court in *U. S.* v. *Smith* and by the Court below, the word "running" was apparently

intended by Congress in the 1944 Act to denote the past tense as when we say "the statute has run" against an offense. The grammatical form of the present participle when used as a noun may at first suggest a present running rather than a "having run." (See *U. S. v. Witherspoon*, 110 F. S. 364, 366 D. C. E. D. Tenn. 1953 (where the Court poses the question, "Does the Suspension Act mean what it would seem at first glance to mean, namely that the running * * * shall be suspended until three years after * * * hostilities.")), but actually such grammatical form, in every day usage, denotes as often and perhaps more often, a past rather than a present act or state. Accordingly, when Congress provided in colloquial terms for the suspension of the "running" of the applicable limitations statute, the reference most likely was to statutes "having run" rather than to the "statute's present running." In other words, what Congress suspended was not the running of the statutory time but the expiration. (See Webster's New International Dictionary, 2d Ed., 1934, where "suspend" is defined to include "to set aside or to make temporarily ineffective, or to 'postpone.' ")

The Committee reports clearly support this position. In enacting the Suspension Act, Congress was concerned primarily with offenses subject to the general three year limitations period. (See S. R. 1544, 77th Cong., 2d Sess., pp. 1-2.) Congress wanted to insure that war time frauds could be discovered and punished "even after the termination of the present conflict" (S. R. 1544, 77th Cong., 2d Sess., pp. 1-2). The history of the 1944 amendment supports the same view. Congress realized that the bulk of the offenses under the Suspension Statute would not be apprehended or investigated until the end of the war and that a reasonable period, to wit, three years would be required to permit such offenses to be prosecuted (S. R.

1057, 78th Cong., 2d Sess., p. 14). Accordingly, with regard to offenses committed prior to the termination of hostilities, the Suspension Act operated to give the Government a limitation period equal to the normal three years plus whatever time had elapsed between the commission of the offense and the termination of hostilities; and for offenses committed after hostilities, the statute began to run on the day after.

This construction provides adequate leeway for investigation and prosecuition by the Government, and is balanced by reasonable regard for the rights of persons charged with crime.

A statute should be given a rational, logical and sensible interpretation (*Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457), and wherever possible the courts should strive to avoid a construction which would make the statute unjust and unreasonable (*Knowlton* v. *Moore*, 178 U. S. 41).

The interpretation of the Suspension Act below and by this Court in *U. S.* v. *Smith*, *supra*, results in an equitable, just, and reasonable operation of that Act, entirely adequate for the purposes intended. The contention of the Government would impute to Congress a construction which would render the Suspension Act incongruous and unjust. Such it would be, if Congress could be said to have provided in the 1944 Acts a six year limitation after termination of hostilities for the prosecution of covered offenses (Suspension Act), and only five years for the keeping of records, as well as only five years for the prosecution of civil offenses under those Acts and, further, if Congress intended by the Suspension Act to apply the three year statute to a crime committed on January 1, 1947, and for crimes committed between August, 1942 and December 31, 1946 allow all that time plus twice the period for crimes committed after hostilities.

The Government claims there is no incongruity in holding, as it contends, for crimes committed between August, 1942, and December 31, 1946, and allowing only three years for crimes committed after December 31, 1946 (Govt.'s brief, p. 20). Yet, it is more than significant that the position it took in its brief in *U. S.* v. *Smith* is directly opposite to the position it now takes (Govt.'s brief in *U. S.* v. *Smith, supra,* p. 20). In the *Smith* case, *supra,* the Government urged the caveat that to hold as this Court finally did as to offenses committed after termination of hostilities would cause the operation of the Suspension Act on crimes committed between August, 1942 and December 31, 1946 to lead to incongruous results. However only the interpretation claimed by the Government would lead to incongruous results. This Court should strive to avoid any construction of the Suspension Act which would place the Congress in such an unintended position.

This Court on numerous occasions has interpreted words in a Congressional enactment in such a manner as to avoid the imputation that Congress could or would intend an unjust statute, with absurd results. See *U. S.* v. *C. I. O.*, 335 U. S. 106, 112, where Mr. Justice Reed, speaking for this Court, construed the word "expenditure" as not a "word of art"; and *U. S.* v. *Bryan*, 339 U. S. 323, 335, where Chief Justice Vinson, speaking for this Court, construed the words "in any criminal proceeding" other than in a literal sense; and *Vermilya-Brown* v. *Connell*, 335 U. S. 377, where Mr. Justice Reed speaking for this Court, stated that this Court was not aided in determining what Congress intended in its use of the word "possession" by the meaning of that word as used in a number of other statutes (at pp. 386-387).

We cannot accept the Government's contention "that at all times when the War Time Suspension of Limitations

Act was under Congressional consideration, a literal interpretation was given its language" (Govt.'s brief, p. 18). As authority for this statement, the Government refers to the hearings before the Subcommittee of the Committee on Armed Services of the House on H. R. 2498, 81st Congress, 1st Session, pertaining to the adoption of the Suspension Act in the Uniform Code of Military Justice (Govt.'s brief, p. 18, footnote 10). But that discussion far from supports the statement made by the Government although, concededly, Mr. Felix Larkin, Assistant General Counsel of the Office of Secretary of Defense on one occasion seems to support it (at page 1046 of those hearings). For example, Chairman Overton Brooks of the Subcommittee, after the proposed Suspension Act was explained by Mr. Larkin (at page 1044), states:

> "Mr. Brooks: Do you think that time limit of three years is sufficient? We are dealing with fraud here, and, of course, I do not know when the war will be formally over, but it is conceivable that we might be engaged in a conflict that will be over the day the last shot is fired. *Is three years long enough to run down fraud, especially when you have these contracts involved?* (Emphasis supplied.)
>
> Mr. Larkin: Well, we do not care to extend it further than the Federal court jurisdiction at present has provided by this section. I think our experience has been, although it can always change, as you indicate, that the official termination of the war is usually not declared until a considerable period after the cessation of actual hostilities and we provide for three years after that, so I should say that is adequate."

Thereafter, Congressman Elston, after claiming that the Government is being placed at a disadvantage in not pre-

venting the limitations from running except when the fraud is discovered as normally exists in State civil suits, stated apropos of the Suspension Act, at page 1046 of the hearings:

> "* * * whereas the fraud perpetrated against the United States could not be prosecuted regardless of how serious it was *unless it was discovered within three years after the termination of the war.*" (Emphasis supplied.)

Both Congressmen thus interpreted the Suspension Statute as the Circuit Court did below and not as contended by the Government. However, it is submitted, these statements are not any more indicative of the legislative intention than is the statement of Congressman Gwynne referred to by the Government (Brief, p. 16).

This Court, in *U. S.* v. *Smith*, *supra*, at page 229, stated:

> "Since under our construction the three years period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformity" (*sic*).

Such a statement, we believe, agrees with the full intention of the Congress. It is earnestly believed that the statement of Mr. Justice Clark in his concurring opinion, at page 230, that the pressing problems of demobilization that are likely to cause a perpetration of frauds upon the Government were for the most part brought to an end at or before the termination of hostilities is a sufficient indication that the Justice Department did not require six years after termination of hostilities to prosecute offenses involving problems of contract termination and surplus property disposal, and that originally, Congress did not intend to give what the Department of Justice did not need.

The decision of the Circuit Court below is a sound application of the fundamental rules governing the interpretation of statutes of limitation, completely consistent with Congressional intention, as first manifested in the Act of 1942. Its construction of the Statute leads to a just and reasonable result. Its decision should be upheld by this Court.

Its reasoning was recently followed in *U. S.* v. *Witherspoon*, 110 F. S. 364, U. S. D. C., E. D. Tenn. February 2, 1953, and also in *U. S.* v. *Clavere et al.* (2 cases), U. S. D. C., N. D. Calif., opinion not officially reported, cert. granted by this Court and case now pending on the docket, Nos. 635, 636.

See, also, *U. S.* v. *Beacon Brass Co.*, 344 U. S. 43, where in an indictment filed on March 16, 1951 charging the substantive crime of income tax evasion under Section 145b of the Internal Revenue Code by making false and fraudulent statements to the Treasury Department on October 24, 1945, Mr. Justice Minton, speaking for this Court, stated at page 45:

> "Obviously, at the times of the indictments here, the three-year limitation period, 18 U. S. C. (Supp. V) Sec. 3282, for violations of this Statute had expired as to statements made in October 1945."

The three year statute would not have expired under the contention made by the Government as to the operation and scope of the Suspension Act.

B. *The Suspension Act is not applicable to the offense charged in this indictment.*

The arguments made under paragraphs B and C of this brief were not raised below. The failure so to do does not, however, it is submitted, preclude the respondent's right to urge these grounds at this time. *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 134, Note 3; *LeTulle* v. *Scofield*, 308 U. S. 415, 421; and *Langnes* v. *Green*, 282 U. S. 531, 538-539. Indeed, the Government impliedly recognizes this fact by anticipating the argument in its brief at page 21, footnote 11, at least as to paragraph B herein. We respectfully submit that these additional grounds have sufficient merit to sustain the judgment of the Court below in its dismissal of this indictment.

The judgment of conviction in this case recites that the respondents were convicted " * * * of conspiring to defraud the United States of a Governmental function in connection with the rationing of sugar and of the honest and faithful services of employees of the Office of Price Administration" (R. 9-10). This in substance is the indictment (R. 2-8). It is our contention that this crime was never intended by the Congress to be within the scope of the Suspension Act because that Act does not apply to any crime unless a pecuniary fraud is an essential ingredient under the Statute defining the offense.

As we have seen in paragraph A of this brief, the 1942 Suspension Act, as amended in 1944, was derived from the Act of November 17, 1921. The language in both Acts as to the nature of the offenses included is substantially identical.

From the Congressional hearings pending the passage of the 1921 Act, it is clear that the need for the legislation was to enable the Government to get at war frauds, and that the war frauds which concerned the Congress were

those where war contractors had made fraudulent contracts with the Government and the Government had lost, as one Congressman said, " * * * millions of dollars" (Congressional Debates on H. R. 8298, the 1921 Act, 67th Congress, 1st Sess., 61 Congressional Record, 7060-7061, 7064, 69 Congressional Record 842 as to repeal of the 1921 Act).

Similarly, in the House Report on the 1921 Act (H. R. 365, 67th Congress), which was adopted and re-quoted in the House Report 2051, 77th Congress, 2d Session, dealing with the proposed 1942 Suspension Act, it was said:

> "Many of these alleged offenses grew out of the contractual relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds."

The House Report on the 1942 Act (H. R. 2051, *supra*) not only embodied House Report 365, *supra*, but also stated:

> "The purpose of the proposed legislation is to suspend any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, *and frauds against all of these agencies are intended to be embraced by the bill.*" (Emphasis supplied.)

The Senate Report No. 1544, 77th Congress, 2d Session, adopted the full report of the House. Therefore, both under the 1921 Act and the Suspension Acts of 1942, as amended in 1944, Congress intended to reach actual out of

pocket frauds which might have been missed as a result of the country's preoccupation with the war effort. It was this type of crime which Congress was primarily interested in, and as stated by the House and Senate reports to the Suspension Act of 1942, were " * * * intended to be embraced by the bill" (H. R. 2051, S. R. 1544).

The term "defrauding" has two accepted meanings. This Court has stated that the usual and primary sense of the word means cheating the Government out of property or money. *U. S.* v. *Cohen*, 270 U. S. 339, 346-347. Under Section 37 of the Criminal Code, it is unlawful for two or more persons to "conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose." The word "defrauding" has been held to have a secondary meaning of interfering with or obstructing lawful Governmental functions by dishonest means. *Haas* v. *Henkel*, 216 U. S. 462, 479-480; *U. S.* v. *Keitel*, 211 U. S. 370, 393. The Suspension Act does not refer to "defrauding or attempts to defraud in any manner or for any purpose * * *," as provided in Section 37 of the Criminal Code, but rather to "defrauding or attempts to defraud * * * whether by conspiracy or not, and in any manner, * * *." The Suspension Act, thus, omits the defrauding "for any purpose," as provided in Section 37. Its language is thus much narrower than that in Section 37 of the Criminal Code under which this indictment was laid. The legislative history of the Suspension Act supports the conclusion that it intended to cover types of frauds defined in their usual and primary sense. It was the pecuniary and financial loss resulting from such frauds that Congress was concerned with.

The Government maintains in its brief (at p. 21, footnote 11) that had the Court below passed upon this ques-

tion, "it would have held this crime to be an offense covered by the Suspension Act, * * *" in view of its previous decisions in *Miller* v. *U. S.*, 24 F. 2 353, cert. den. 276 U. S. 638 and *Falter* v. *U. S.*, 23 F. 2 420, cert. den. 277 U. S. 590, interpreting the six year limitation proviso in the 1921 Act; and its decision in *U. S.* v. *Gottfried*, 165 F. 2 360, cert. den. 333 U. S. 860, interpreting the scope of the 1942 Suspension Act.

I cannot agree with the Government in this regard, although I recognize that under these decisions, particularly in *Miller* v. *U. S.*, *supra*, at page 360, the Government may find some comfort in its position.

It is true that the *Miller* and *Falter* cases presented conspiracies to defraud wherein the objects of the conspiracies resulted in pecuniary or property losses to the Government. In the *Miller* case, the conspiracy contemplated the determination and disposition of claims under the Trading with the Enemy Act by the Alien Property Custodian and the Attorney General. *Miller* v. *U. S.*, *supra*, page 354. In the *Falter* case, the conspiracy contemplated the acquisition by defendant through fraudulent means of "* * * large amounts of textiles at prices lower than the Branch (Textile Branch of Property Division of War Department) would have sold them but for the fraud" (*Falter* v. *U. S.*, *supra*, at p. 422; parentheses supplied).

Yet, I believe most respectfully that the rationale of the decisions stemmed from an erroneous conception of the scope of the 1921 Act which the 2d Circuit Court would not follow today. The *Falter* and *Miller* cases construe the 1921 Act as co-extensive in scope with Section 37 of the Criminal Code dealing with conspiracies to defraud. The Second Circuit in the *Gottfried* case did likewise (*U. S.* v. *Gottfried*, *supra*, at p. 368, footnote 21, citing *Haas* v. *Henkel*, 216 U. S. 462, 479). In the *Miller* case,

the Court referred to Section 37 of the Criminal Code, wherein it said, the word "defraud" was coupled with the phrase "in any manner" and that the proviso of the 1921 Act made "* * * clear its comprehensiveness in emphasizing and enlarging by the phrase, 'whether by conspiracy or not,' and by the further words 'now indictable under any existing statute,'" (*U. S.* v. *Miller, supra,* p. 360), so as to embrace all conspiracies to "defraud" under Section 37.

Such reason, however, slights the Congressional intention as to the types of frauds contemplated by the 1921 and 1942 Acts which, as we have seen, were solely directed to money and property claims. Furthermore, the rationale is squarely at odds with this Court's holding in *U. S.* v. *McElvain,* 272 U. S. 633 where it was flatly stated, at page 639:

> "The purpose of the added proviso was to carve out a special class of cases. It is to be construed strictly and held to apply only to cases shown to be clearly within its purpose. Cases cited."
>
> "The proviso relates to substantive offenses involving defrauding or attempts to defraud the United States whether committed by one or more or conspiracy or otherwise. * * * *The language of the proviso cannot reasonably be laid to include all conspiracies as defined by Section 37. But if the proviso could be construed to include any conspiracies, obviously it would be limited to those to commit the substantive offenses which it covers.*" (Emphasis supplied.)

The conspiracy in the *McElvain* case was a conspiracy to "defraud" under § 37 of the Criminal Code, like the present indictment. The Government argued there, as it does here, that "defrauding the U. S. is an ingredient of

the crime charged, and that the six year period applies" (*U. S.* v. *McElvain, supra,* p. 638). This argument was rejected. As indicated by the quote above, this Court interpreted the 1921 Act to apply to conspiracies to commit substantive offenses involving defrauding or attempts to defraud the United States under § 37, but not as claimed by the Government to conspiracies to defraud under § 37. This Court similarly rejected the Government's argument in *U. S.* v. *Scharton,* 285 U. S. 518, where the Government claimed that any attempt to obstruct or defeat the lawful functions of any department of Government by dishonest methods, identical with the conspiracy charged here, constituted a "defrauding" within the meaning of the 1921 Act. (*U. S.* v. *Scharton, supra,* at pp. 520-521).

The 1921 Act, as did the 1942 Suspension Act, as amended in 1944, omitted from these statutes, as has been previously pointed out, the words "for any purpose" contained in Section 37 of the Criminal Code. If Congress had intended to include all conspiracies to defraud under Section 37, and not solely pecuniary and property war frauds which we maintain, it would have been simple to provide a "defrauding" "in any manner or for any purpose" as was provided in Section 37. Its omission to do so confirms the specific intention of Congress to limit the proviso in the 1921 Act and the later Suspension Acts to war frauds where the Government was cheated out of money and property. This was the conclusion reached by this Court in the *McElvain* case in its construction placed upon the 1921 Act.

In *Marzani* v. *U. S.,* 168 F. 2 133, U. S. App. D. C. affirmed by a divided court in 335 U. S. 895 (cited with approval in *U. S.* v. *Obermeier,* 186 F. 2 243, 257, footnote 64, 2d Cir.), it was held that the Suspension Act of

1942, as amended in 1944, did not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient. It would follow without question that a conspiracy to commit a substantive offense would be construed in the same manner. If there be a conspiracy to commit an offense of which a pecuniary or property fraud is not an essential element, the Suspension Act would not apply.

It is well settled that a conspiracy to defraud in the secondary sense, *i.e.*, by interfering with or obstructing the lawful operations of an agency of the Government such as charged here will lie under Section 37 of the Criminal Code even though pecuniary or property loss to the Government is not contemplated and does not result. *U. S.* v. *Gilliland*, 312 U. S. 86; *Hammerschmidt* v. *U. S.*, 265 U. S. 182; *Haas* v. *Henkel*, 216 U. S. 462. Thus a pecuniary or property fraud is not an essential ingredient of a conspiracy to defraud under § 37.

To hold, therefore, that the Suspension Act does not apply to a conspiracy to commit offenses, where a pecuniary fraud is not an essential element, but does apply to any conspiracy to defraud, where pecuniary fraud is not an essential element, would create an anomalous situation never intended by Congress. Such a construction would lead to absurd results.

There are few situations where the Government could not bypass a conspiracy to commit an offense and lay the same crime as a conspiracy to defraud in order to bring the crime within the Suspension Act. See, *e.g.*, *Bridges* v. *U. S.*, 199 F. 2 811, 9th Cir., pending before this Court, No. 548; Cf. *U. S.* v. *Ausmeier*, 152 F. 2 349, 356, 2d Cir. Such a construction would place in the hands of the Government a procedural gimmick which would enable it to sweep under the broad conspiracy to defraud concept of

Section 37 of the Criminal Code any conspiracy to commit substantive crimes, *already outlawed*, where pecuniary fraud is not an essential element of the substantive offense. Cf. *In re Doyle*, 42 F. 2 686, S. D. N. Y., rev'd on other matters *U. S.* v. *Doyle*, 47 F. 2 1086.

The indictment does little else but to charge a conspiracy to commit substantive violations of the Sugar Rationing laws and the Maximum Price Regulations under the Emergency Price Control Act. Many of these offenses were outlawed long before the present indictment. They are types of offenses completely different from the war frauds intended by Congress. Yet they are swept together in a conspiracy to defraud charge which can revive them under the Suspension Act, if the Government's position is maintained.

It is for these reasons that we do not think the Court below would have followed these cases referred to by the Government. The Court below discredited, if not overruled, its decision in the *Gottfried* case in *U. S.* v. *Obermeier*, 186 F. 2 243, 2d Cir. Its decision below in the instant case is further proof of the fact that it would not accept a forced construction of the Suspension Act, as maintained by the Government which is clearly at odds with Congressional intention.

It is most respectfully submitted, therefore, that the Suspension Act of 1942, as amended in 1944, was inapplicable to the crime charged in this indictment and that the three year Statute of Limitations applied to bar the indictment.

C. *The Suspension Act was expressly repealed by the Act of June 25, 1948 and was not preserved by either the savings clause in Section 21 of that Act, or the general savings clause, Section 109, Title 1, U. S. C., so as to apply to the indictment in this case.*

The Act of June 25, 1948, c. 645, Section 21, 62 Stat. 802, eff. September 1, 1948, which revised the Criminal Code, repealed the Suspension Act, and with minor changes in language, reenacted it to make this Section permanent instead of temporary legislation. (See *Reviser's Note* following 18 U. S. C., Sec. 3287; *U. S.* v. *Smith*, 342 U. S. 225, 226, footnote 1.) In its permanent form, Sec. 3287 of Title 18 prefaces the Statute with the words, "when the United States is at war." This Act took effect September 1, 1948, so that at the time of this indictment on March 31, 1950, the Suspension Act of 1942, as amended in 1944, had been repealed by some eighteen months.

The examination that has been made of the legislative history of the Suspension Act would seem to indicate clearly that the Suspension Act was primarily directed to the period during actual hostilities of World War II, and not thereafter during the technical state of war that followed until the signing of a treaty of peace. (See also *U. S.* v. *Smith*, *supra*, at pages 228-229.) It cannot be contended that the new Sec. 3287 of Title 18 applies to the present indictment some three years after the shooting war stopped and approximately nineteen months after the termination of hostilities. The Government makes no such claim in its brief, but merely assumes, as did the Court below, that the Suspension Act, as amended in 1944, applies (Govt.'s brief, pp. 7, 9). The Reviser's Note as hereinafter quoted clearly indicates that Sec. 3287 was intended to apply to any future war in which the United States might be involved:

"The phrase 'when the United States is at war' was inserted at the beginning of this Section to make it permanent instead of temporary legislation, and to obviate the necessity of reenacting such legislation in the future" (Reviser's Note to Sec. 3287).

But, unless the Suspension Act claimed to be applicable here was preserved by some effective saving provision, it cannot be resurrected to apply to this indictment. Such a repeal without more has been held to constitute a legislative pardon or amnesty as to all past offenses. *U. S.* v. *Chambers,* 291 U. S. 217, 223; *Yeaton* v. *U. S.,* 5 Cranch 281, 283; *Maryland* v. *B. & O. R. Co.,* 3 How. 534; *U. S.* v. *Obermeier,* 186 F. 2 243, 251, 2d Cir., cert. den. 340 U. S. 951.

The applicability of the Suspension Act to this indictment, therefore, depends upon the meaning of the savings clause contained in Sec. 21 of the repealing act (found at p. 275, Secs. 1-370, Title 18, U. S. C.) or upon the general savings clause in effect at the time of the repeal of the Suspension Act (found in Sec. 109, Title 1, U. S. C., formerly R. S. Sec. 13). Sec. 21 provides as follows:

"The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

Sec. 109 provides as follows:

"Repeal of statutes as affecting existing liabilities. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing

> Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

It is our contention that the tolling of the Statute of Limitations under the Suspension Act did not constitute a "right" of the Government or a "penalty," "forfeiture" or "liability" of the respondents within the meaning of the savings clauses of either Sec. 21 of the 1948 Act or Sec. 109 of Title 1, U. S. C.

In *U. S.* v. *Obermeier*, 186 F. 2 243, 2d Cir., that Court considered the effect of both statutory provisions upon existing statutes of limitation. After an exhaustive and extremely able analysis of the legislative history of Sec. 109, Title 1, U. S. C., and previous adjudications, that Court, in the opinion of Judge Jerome Frank, concluded that neither the savings clause contained in Sec. 21 of the 1948 Act nor the general savings clause contained in Sec. 109, Title 1, U. S. C., preserved the repealed Statute, namely Sec. 746(g), Title 8, U. S. C. (five year limitation for naturalization offenses) because such savings clauses related only to "substantive rights" and "liabilities," but not to the preservation of remedies provided by a statute of limitation. As the Court stated, at page 254:

> "Since 1 U. S. C. A., Section 109, formerly R. S. Section 13, saves merely substantive 'rights' and 'liabilities,' we think it does not save limitation statutes as to past offenses. For usually, a statute of limitations is considered no part of a 'right' or 'liability,' but has affected the 'remedy' only.",

and further at page 255:

> "We think, however, that, for the reasons we have canvassed, the context of 1 U. S. C. A., Section 109, and

> Section 21 of the 1948 Act shows that they were not intended to include, any 'rights' or 'liabilities' of statutes of limitation."

The reasoning in the *Obermeier* case is equally applicable to the Suspension Act. Certainly, as the Second Circuit put it in the *Obermeier* case, *supra*, at page 255, had Congress had a contrary intention, "it would have been so easy to have said so. Cases therein cited."

This Court's recent opinion in *De La Rama S.S. Co.* v. *U. S.*, 344 U. S. 386, it is submitted, is not a contrary authority for the proposition asserted here. In that case, the Court was concerned not with a statute of limitations, but with the effect of the repeal of a statute upon an existing civil action pending in the District Court of the United States. This Court considered the loss of dollars and cents to the petitioner if his cause of action was transferred to the Court of Claims. It felt that the "liability" of the Government and the "right" of the petitioner to recover what the Government admitted it owed would be materially reduced in dollars and cents, if the jurisdiction in which the action was brought was transferred from the District Court to the Court of Claims. The Court thus construed the general savings clause in Sec. 109, Title 1, U. S. C., liberally in favor of the petitioner to permit his action to remain where it was in order to avoid a gross miscarriage of justice.

However, in the instant case we are dealing with the preservation of a statute of limitations pertaining to criminal offenses. The repeal of the Suspension Act long antedated the filing of the indictment. The *De La Rama* case (*supra*) is thus inapplicable. In *U. S.* v. *Smith*, *supra*, at page 261, footnote 1, this Court expressly left open the question of the effect of the repeal of the Suspension Act on the running of a statute of limitations.

It is respectfully submitted that the repeal of the Suspension Act was not preserved by either the savings clause contained in the 1948 Act or by the general savings clause contained in Section 109, Title 1, U. S. C.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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